Supreme Court, U.S.
FILED
JUN 8 - 2009
OFFICE OF THE CLERK

No. 08-1373

IN THE
Supreme Court of the United States

WARREN STANCOURT, *et ux.*, Parents of
GREGORY STANCOURT,

Petitioners,

v.

WORTHINGTON CITY SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the parents' receipt of prior written notice two days after the gradual thinning of reinforcers in their son's behavior plan began is actionable under the Individuals with Disabilities Education Act when no harm resulted from that technical procedural violation.

II. Whether the thinning of behavioral reinforcers over a period of time, with the immediate reinstatement of those reinforcers if the student's behavior lapses, constitutes a change in placement under the stay put provision of the Individuals with Disabilities Education Act when such thinning was contemplated by the behavior plan developed with the parents' input and agreed to by the parents.

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INTRODUCTION

Petitioners have presented no compelling reason for which the Court should grant their Petition for a Writ of Certiorari ("Petition"). Specifically, Petitioners have failed to demonstrate that the September 9, 2008 Opinion of Ohio's Tenth Appellate District Court conflicts with a decision of this Court or any other federal court nor have they shown that the Tenth Appellate District decided an important question of federal law in a way that should be settled by this Court. In reaching its decision, the Tenth Appellate District evaluated and interpreted the formerly-effective version of the IDEA, Title 20, U.S. Code, Pub. L. No. 105-17, 111 Stat. 37 (1997), its attendant Regulations, and Ohio's then-effective Administrative Code.

Petitioners contend that the Sixth Circuit Court of Appeals' standard, requiring a showing of substantive harm for a procedural violation of the Individuals with Disabilities Education Act ("IDEA" or "the Act") to be actionable, is in direct conflict with the standard utilized by the Fourth and Fifth Federal Circuit courts, which allegedly deem procedural irregularities per se violations of the Act. The Tenth Appellate District relied on the Sixth Circuit's standard in ruling for the Respondents. Petitioners' argument ignores more recent rulings of the Fourth and Fifth Circuits which soundly reject the concept of per se violations and, instead, evaluate whether actual harm existed in the face of a procedural violation under the Act. The remaining federal circuit courts have determined that a procedural violation is only actionable when harm to either the student or the parents' opportunity to

participate in the development of the IEP has actually occurred in connection with that violation. Further, the standard applied by the Tenth Appellate District comports with this Court's decision establishing a two-part inquiry – one procedural and the other substantive – in evaluating whether the Act has been violated.

In its 2004 re-authorization of the IDEA, Congress incorporated the requirement that a procedural violation result in harm for it to be actionable. There is no question that harm is a necessary element.

Petitioners also assert that the Court should define "educational placement" under the IDEA as it relates to the Act's stay put provision because the phrase is not defined in the Act or its attendant regulations. Despite revisiting the Act sixteen times in the last twenty years, Congress has not elected to define "educational placement." The United States Department of Education ("DOE"), the Ohio Department of Education ("ODE"), and Ohio's General Assembly have likewise left the phrase undefined. This Court should not define the phrase "educational placement" under these circumstances. Rather, the plain meaning of the statutory provision provides sufficient guidance.

There is no great or general public interest at stake here. Rather, this matter concerns only Petitioners' private disagreement with the Tenth Appellate District's decisions, which are legally and factually correct. Furthermore, the substantive merits of Petitioners' position have never been addressed since the impartial due process hearing requested by

Petitioners to determine whether their son has been accorded a free appropriate public education ("FAPE") has not yet occurred. Despite the passing of nearly seven years, the case is not yet ripe for this Court's review. Petitioners have failed to sustain their burden of demonstrating any compelling reasons for this Court to grant the Petition, and it should be denied accordingly.

RELEVANT STATUTES AND REGULATIONS

The following portions of the former Individuals with Disabilities Education Act, Title 20, U.S. Code, Pub. L. No. 105-17, 111 Stat. 37 (1997), the Department of Education's formerly-effective Regulations, and Ohio's formerly-effective Administrative Code are relevant to this matter:

20 U.S.C. §1415(a) - Establishment of procedures

> Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

20 U.S.C. §1415(j) - Maintenance of current educational placement

> Except as provided in subsection (k)(7) of this section, during the pendency of any

proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

34 C.F.R. §300.514 - Child's status during proceedings

(a) Except as provided in §300.526, during the pendency of any administrative or judicial proceeding regarding a complaint under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section.

Ohio Admin. Code §3301-51-02(G)(6)(a) - During the pendency of any impartial due process hearing or subsequent appeals, unless the parent and the school district agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

The following portions of the currently-effective Individuals with Disabilities Education Act, Title 20, U.S. Code, Pub. L. 108-446, 118 Stat. 2647 (2004), amending 20 U.S.C. §§1400 *et seq.*, and the Department of Education's Regulations implementing that law are also relevant to Respondent's arguments opposing the Petition:

20 U.S.C. §1415(a) - Establishment of procedures

> Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

20 U.S.C. §1415(f)(3)(E)(ii)- Impartial Due Process Hearing

(3) Limitations on hearing

(E) Decision of hearing officer

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

20 U.S.C. §1415(j) - Maintenance of current educational placement

Except as provided in subsection (k)(4) of this section, during the pendency of any proceedings conducted pursuant to this

section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

34 C.F.R. §300.116 – Placements

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that –

(a) The placement decision –

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§300.114 through 300.118;

(b) The child's placement –

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. §300.518- Child's status during proceedings

(a) Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under §300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency.

(d) If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of paragraph (a) of this section.

STATEMENT OF THE CASE AND RELEVANT FACTS

In January of 2002, Petitioners Warren and Tammy Stancourt (also "the Stancourts") participated in the creation of an individualized education program ("IEP") for their son, Gregory Stancourt, to be implemented at Respondent Worthington City School District (also "the School District"). (Pet. App. at 3a)[1] The January 22, 2002 IEP, with the agreement of the Stancourts, established annual educational goals and objectives for their son and also contained a behavior plan that identified the following objectives for Gregory: 1) completing and turning in assignments within the allotted time; 2) refraining from touching others by keeping his hands and feet to himself; 3) completing work neatly; 4) increasing the duration of time he is on task; and 5) working without vocalizations. (Pet. App. at 4a) The behavior plan established a point system under which Gregory earned and lost points depending on his targeted behavior during the instructional periods of his school day. (*Id.*) The behavior plan also provided that, if Gregory earned eighty percent of the available points for two consecutive weeks, the targeted behaviors would be considered mastered, and the IEP team would reconvene to discuss the fading of the behavioral reinforcers. (Pet. App. at 5a)

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1. The September 9, 2008 Opinion of the Tenth Appellate District Court accurately recites the procedural and factual bases underlying the Stancourts' Petition. Therefore, Respondent's citations to Petitioners' Appendix herein are directed to the text of that Opinion.

School District officials met with the Stancourts on April 10, 2002 and proposed an addendum which called for the thinning of the behavioral reinforcers because Gregory had earned eighty percent of the total available points under the behavioral plan for two consecutive weeks. (Pet. App. at 5a) The April 10th addendum specifically provided for a gradual reduction in the number of points available to Gregory, a reduction of the frequency of reinforcers for the performance of targeted behaviors, and the eventual elimination of the behavior plan. (*Id.*) The April 10 addendum also stated that the January 22, 2002 behavior plan would be reinstated if Gregory did not maintain the targeted behaviors with intermittent reinforcement. (*Id.*) The Stancourts refused to sign the addendum, requesting time to read, consider and discuss it with Gregory's psychologist. (*Id.*) On April 13, 2002, the School District issued a Written Notice to Parents notifying the Stancourts that the April 10th addendum would take effect on Monday, April 15, 2002 and informing them of the procedural safeguards available to them under the Act. (Pet. App. at 6a) The Stancourts claim to have received the Notice on April 17, 2002 and presently contest the School District's implementation of the April 10th addendum prior to their receipt of the Notice. (*Id.*)

The Stancourts initially filed their request for an impartial due process hearing against the School District with the ODE on May 31, 2002. The Stancourts withdrew their request a short time later and then refiled it on August 26, 2002. (Pet. App. at 6a) The hearing request alleged that the School District had denied Gregory Stancourt FAPE.

On October 2, 2002, the Impartial Hearing Officer ("IHO") appointed by the Ohio Department of Education to conduct the administrative hearing issued a decision regarding Gregory Stancourt's stay put placement during the pendency of the administrative proceedings. (Pet. App. at 7a) The decision was necessitated by a dispute between the parties about whether Gregory's IEP included the addendum the School District proposed on April 10, 2002. (Pet. App. at 8a) The IHO determined that the IEP included the April 10th addendum. (*Id.*)

On February 13, 2003, the IHO dismissed Petitioners' due process proceedings with prejudice based on their failure to comply with the IHO's order to release Gregory's medical and mental health treatment records to the School District. (Pet. App. at 8a) This decision was appealed to a State Level Review Officer ("SLRO"), appointed by the Ohio Department of Education, who amended the order to a dismissal without prejudice. (*Id.*) The SLRO did not address the stay put placement. (*Id.*)

Petitioners appealed to the Franklin County Court of Common Pleas, and, on July 27, 2004, the court issued a judgment, reversing the IHO and SLRO dismissals, and affirming the IHO's determination that the April 10, 2002 addendum was a part of Gregory's stay put IEP. (Pet. App. at 8a)

Petitioners then appealed to the Franklin County Court of Appeals, Tenth Appellate District, arguing that the IHO erred in determining that the April 10, 2002 amendment was a part of stay put placement. (Pet. App.

at 8a) The School District cross-appealed from the trial court's decision that the SLRO lacked authority to dismiss a due process request based on their failure to comply with the IHO's order to release medical and mental health records. (*Id.*) On October 27, 2005, the court of appeals affirmed the trial court's judgment reversing the dismissals of the Stancourts' due process hearing request. (Pet. App. at 9a) With respect to whether the April 10, 2002 addendum was part of Gregory's stay put placement, the court of appeals held that the trial court erred in failing to make the necessary finding of whether the April 10, 2002 addendum implicated a detrimental change in the elements of the IEP or fundamentally changed or eliminated a basic element of the IEP. (*Id.*) The Tenth Appellate District remanded the matter for the trial court to make that determination. (*Id.*) The Court also directed the trial court to consider whether the School District deviated from the procedural requirements of the IDEA in providing written notice to the Stancourts two days after the April 10, 2002 addendum was implemented, and if so, whether the deviation resulted in substantive harm. (*Id.*)

On remand, a magistrate conducted an evidentiary hearing and considered expert testimony from both parties, documentary evidence submitted by both parties, the administrative record and the arguments of counsel. (Pet. App. at 9a) The magistrate issued a decision on March 20, 2007, finding and concluding that the April 10, 2002 addendum neither implicated a detrimental or fundamental change to Gregory's IEP nor eliminated a basic element of the IEP. (*Id.*) The magistrate also found that, while a technical violation

may have occurred in that the Stancourts received the written notice of the April 10, 2002 IEP addendum's implementation two days after implementation had begun, there was no resulting substantive harm. (Pet. App. at 10a)

The Stancourts objected to the magistrate's decision, and, on July 26, 2007, the trial court adopted the decision. (Pet. App. at 10a) Final judgment was entered by the trial court on September 13, 2007, dismissing the Stancourts' appeal. (*Id.*)

Once again, the Stancourts appealed to the Franklin County Court of Appeals, Tenth Appellate District, asserting a single assignment of error – that "the trial court committed reversible error in finding that Gregory Stancourt was not harmed by the actions of the Worthington City Schools." (Pet. App. at 10a) On September 9, 2008, the court of appeals rendered its opinion, affirming the judgment of the trial court in its entirety. (Pet. App. at 21a and 22a) The Stancourts petitioned the Ohio Supreme Court for review of the Tenth Appellate District's determinations. (Pet. App. at 148a) That court declined to exercise its discretionary jurisdiction over the matter. (*Id.*)

Petitioners now request that this Court grant certiorari even though there has been no decision on the merits of the Stancourts' underlying claim. All of the administrative and judicial review to date has been on procedural issues. It has been determined that the administrative proceedings should not have been dismissed for the Stancourts' failure to provide Gregory's medical and mental health treatment records.

It has also been determined that Gregory's stay put IEP for the duration of the administrative proceedings is his 2002 IEP, which includes the April 10, 2002 addendum. The proper venue now is for the IHO to determine, in an administrative proceeding, whether the School District denied Gregory Stancourt a free appropriate public education as alleged in the due process hearing request filed by the Stancourts on August 26, 2002. Until a decision on the merits is issued and the administrative remedies contemplated by the IDEA are exhausted, this case is not final.

REASONS FOR DENYING THE PETITION

I. THE OPINION OF THE TENTH APPELLATE DISTRICT COURT COMPORTS WITH THE SCOPE AND THE INTENT OF THE IDEA, THE DECISIONS OF THIS COURT AND THE STANDARD APPLIED BY THE FEDERAL CIRCUIT COURTS.

In *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176 (1982), the case in which this Court was first called upon to interpret a provision of the Act, the Court noted the importance Congress attached to the procedural safeguards contained in Section 1415 of the Act and established a two-part inquiry for suits brought under that Section. 458 U.S. at 187, 205, and 206-207. First, it should be determined whether the State complied with the procedures set forth in the Act. *Id.* at 206. Second, it should be determined whether the IEP developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits.

Id. at 206-207. In articulating this standard, the Court remained mindful of the intent underlying the Act, which was ". . . primarily to make public education available to handicapped children . . ." *Id.* at 191.

Heeding the Court's dictates, the federal circuit courts began fashioning a standard for determining when a party's violation of the Act's procedures constitutes a substantive denial of FAPE. They ultimately responded with a reasonable approach that best serves the interests of the parties while adhering to the intent of the Act: a party's procedural violation of the Act will constitute a denial of FAPE to a child only if the violation causes harm to the child or the parents' opportunity to participate in the IEP process. *See, e.g., W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990); *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651, 661-662 (11th Cir. 1990); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990). This common sense approach properly denies the promotion of form over substance and ensures that any deviation from the IDEA's many complex procedural requirements will not interfere with school districts' provisions of special education services to disabled children *unless* that procedural deviation has resulted in actual harm. Petitioners' arguments for certiorari unjustly attribute malicious intent to every school district that happens to violate one of the Act's procedural safeguards – procedures this Court characterizes as "elaborate and highly specific." *Rowley*, 458 U.S. at 205. Regardless, parents are "likewise obligated to operate within the Act's procedural framework," so the necessity that harm

result from any procedural violation prevents their missteps from interfering with the provision of special education services to their children as well. *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990), *cert. denied*, 499 U.S. 938 (1991).

The actionable harm contemplated by the standard is specific to each situation and has been found to range from the keeping of insufficient data and the withholding of information from a student's parents, *Metropolitan Bd. of Pub. Educ. v. Guest*, 193 F.3d 457, 459, 464-465 (6th Cir. 1999), to a failure to formally offer an educational placement to a disabled student. *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1525-1527 (9th Cir. 1994), *cert. denied*, 513 U.S. 965 (1994). Again, the element common to these seemingly-unrelated procedural violations is the existence of harm.

A. The Sixth Circuit's Limitation that a Procedural Violation is Only Actionable if it Causes Substantive Harm Does Not Conflict with the Standard Applied by Any Other Circuit.

The Tenth Appellate District Court relied on two Sixth Circuit cases in determining that no substantive harm existed in the present matter, *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6th Cir. 2001), *cert. denied*, 533 U.S. 950 (2001), and *Dong v. Board of Educ. of Rochester Comm. Schs.*, 197 F.3d 793, 801 (6th Cir. 1999). (Pet. App. at 22a -23a) In *Knable*, the Sixth Circuit reviewed the two-part standard this Court established in *Rowley* and stated that "a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation

causes substantive harm to the child or his parents." 238 F.3d at 765 (*citations omitted*). The court adopted its definition of "substantive harm" from the Ninth Circuit, explaining, "Substantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process." *Id.* (*citing W.G.*, 960 F.2d at 1484). The Sixth Circuit further stated that "procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute a denial of a FAPE under the Act." *Id.* at 766 (*citations omitted*).

In *Dong*, the Sixth Circuit explained, "While we strictly review an IEP for procedural compliance, technical deviations do not render an IEP invalid." 197 F.3d at 801 (*citations omitted*). The court's statement reflects its consideration of and adherence to this Court's *Rowley* inquiries while applying a workable standard to the circumstances presented for its review.

The Tenth Appellate District Court correctly determined that no substantive harm occurred in the present matter because the Stancourts were not precluded from meaningful participation in the IEP process. (Pet. App. at 22a) Rather, they fully participated in the creation of their son's January 2002 IEP, including the behavior plan that contemplated the thinning of behavioral reinforcers upon Gregory's mastery of targeted behaviors, and consented to its implementation. (Pet. App. at 23a) Furthermore, the Stancourts actually met with School District representatives on April 10, 2002, where they were presented with the draft

addendum that called for the actual thinning of those reinforcers. (*Id.*) The addendum also required the reinstatement of the behavioral reinforcers contained in the January 2002 IEP if Gregory's mastery of the targeted behaviors lapsed. (Pet. App. at 23a-24a) The Stancourts did not consent to implementation of the addendum that day.

The procedural violation of which the Stancourts complain is their receipt of the School District's prior written notice a mere two days after the gradual thinning of reinforcers began on April 15, 2002. Despite their alleged ire, the Stancourts waited nearly six weeks to initiate due process proceedings against the School District, only to withdraw them and then refile them again three months later. (Pet. App. at 23a)

As accurately explained by the Tenth Appellate District, "The Stancourts were involved in each step of the development and implementation of Gregory's IEP. That they disagreed with implementation of the April 10, 2002 addendum does not equate to a finding of substantive harm." (Pet. App. at 23a) If the Stancourts had been denied the opportunity to participate in the IDEA's processes or Gregory had either been denied an IEP or lost educational opportunities, the School District's alleged procedural violation would have been actionable under the standard applied by the Sixth Circuit and, consequently, Ohio's Tenth Appellate District Court. The fact remains that neither Petitioners nor their son suffered any harm. The Stancourts fully participated in the development of their son's IEP, were consulted regarding the April 10th addendum and were provided notice of all their rights under the Act, and

Gregory received the special education and related services contained in his IEP.

Petitioners attempt to set aside the Tenth Appellate District's determinations by creating a conflict among the federal appellate circuits that simply does not exist. Petitioners assert that both the Fourth and Fifth Circuit Courts of Appeals "have specifically held that a school district's failure to comply with the procedural requirements of the IDEA constitutes a *per se* violation of the Act" and cite two cases in support of that proposition, *Jackson v. Franklin County Sch. Bd.*, 806 F.2d 623, 629 (5th Cir. 1986), and *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985). (Pet. at 25) (emphasis in original).

In *Jackson*, the Fifth Circuit purported to adopt Petitioners' alleged per se violation analysis but remanded the matter to the district court for a determination of the loss caused by the school district's procedural violation. *Doe v. Alabama State Dept. of Educ.*, 915 F.2d at 662 (*analyzing and citing Jackson*, 806 F.2d at 631). In *Hall*, the Fourth Circuit described the school district's repeated failures to notify the parents of their rights under the Act and its concomitant failure to develop an adequately specific IEP and then noted, "Under *Rowley*, these failures to meet the Act's procedural requirements are adequate grounds by themselves for holding that the school failed to provide James a FAPE . . ." 774 F.2d at 634, 635. However, the court found that the school district's repeated denials of information to the parents concerning their rights interfered with their ability to effectively participate in the IEP processes provided by the Act. *Id.* at 633, 634.

In both *Jackson* and *Hall*, the presence of real harm actually drove the courts' analyses and determinations. Regardless, more recent decisions by both the Fourth and Fifth Circuits disavow their alleged adoption of a per se standard.

For example, in *Speilberg v. Henrico County Pub. Schs.*, 853 F.2d 256 (4th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989), the Fourth Circuit held that a procedural violation constituted a denial of FAPE when the school's decision to place the child at a particular facility without first developing an IEP denied the student's parents involvement in the decision-making process as provided by the Act. 853 F.2d at 259. Similarly, in *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990), the Fourth Circuit Court of Appeals looked to the harm flowing from the school district's violation of time limits established by state regulations to determine that relief was warranted where the procedural violation delayed the establishment of an appropriate IEP for the student. 908 F.2d at 1207. In *DiBuo v. Board of Educ.*, 309 F.3d 184 (4th Cir. 2002), the court explained, "[U]nder our circuit precedent, a violation of a procedural requirement of the IDEA...must actually interfere with the provision of a FAPE." 309 F.3d at 190.

In *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003), the Fifth Circuit Court of Appeals expressly adopted the standard dictating that a procedural violation under the IDEA is not actionable unless it results in a student's loss of educational opportunity or infringes upon the parents' opportunity to participate in the IEP process. 328 F.3d at 812-813 (*citing W.G.*, 960 F.2d at 1484, and *Doe v. Defendant I*,

898 F.2d 1186, 1191 (6th Cir. 1990)). There can be no question that the Fifth Circuit agrees with the standard applied by the Sixth Circuit.

Every remaining federal appellate circuit requires a showing of harm before it will deem a procedural violation of the IDEA actionable. *G.N., ex rel. J.N., v. Board of Educ. of the Twnshp. of Livingston*, 309 Fed. Appx. 542, 2009 U.S. App. LEXIS 2455, at *10-*11 (3rd Cir. 2009) (*citing* 20 U.S.C. §1415(f)(3)(E)(i) and (ii), *W.G. v. Board of Trustees*, *infra*, and *Roland M. v. Concord Sch. Comm.*, *infra*, and requiring harm for a procedural violation committed during the formulation of a child's IEP to be actionable); *Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060, 1065 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 2962, 171 L.Ed. 2d 906 (2008) ("Procedural flaws do not require a finding of a denial of a free appropriate public education. However, procedural inadequacies that result in the loss of educational opportunity result in the denial of a free appropriate public education."); *Lesesne v. District of Columbia*, 447 F.3d 828, 832 (D.C. Cir. 2006) ("[V]iolations of IDEA's procedural requirements are actionable only if they affect a student's substantive rights."); *Stringer v. St. James R-1 Sch. Dist.*, 446 F.3d 799, 803-804 (8th Cir. 2006) ("The district court properly dismissed the claim for a violation of written notice" where it found "plaintiffs both participated in developing the IEP and had actual notice of the IEP meeting where discussion occurred."); *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 (2nd Cir. 2005) ("In considering whether the District fulfilled IDEA's procedural obligations, we focus on whether the Cerras had an adequate opportunity to participate in the development of

Kathryn's IEP."); *Logue v. Unified Sch. Dist. No. 512, Shawnee Mission*, 153 F.3d 727 (table), 1998 U.S. App. LEXIS 16280, at *9 (10th Cir. 1998) ("[A]ny deficiency in the IEP process must result in prejudice to the student or his parents before a court may find that the IDEA was violated."); *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d at 1484 ("Procedural flaws do not automatically require a finding of denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity . . . or seriously infringe the parents' opportunity to participate in the IEP formulation process . . . clearly result in the denial of FAPE.") (*citations omitted*); *Doe v. Alabama State Dept. of Educ.*, 915 F.2d at 663 ("[T]he school's violation of the letter of the requirement does not require relief where, as here, the parents fully participated in the IEP process and there was no harm flowing from the procedural violation."); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (*en banc*), *cert. denied*, 499 U.S. 912 (1991) ("Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of education benefits."). As a result, the conflict Petitioners assert as a basis for granting certiorari in this matter is illusory.

B. Congress Expressly Limited Actionable Procedural Violations to Those that Result in Actual Harm.

Congress re-authorized the IDEA in 2004, substantively revising its terms and including new language that is particularly relevant to this Petition. *See* Title 20, U.S. Code, Pub. L. 108-446, 118 Stat. 2647 (2004), amending 20 U.S.C. §§1400 *et seq.* Congress essentially adopted the standard articulated by the federal appellate circuits and codified it in the re-authorized IDEA at Section 1415(f)(3)(E)(ii). That Section now provides:

> (ii) Procedural issues
>
> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education *only if* the procedural inadequacies –
>
> (I) impeded the child's right to a free appropriate public education;
>
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
>
> (III) caused a deprivation of educational benefits.

20 U.S.C. §1415(f)(3)(E)(ii) (emphasis added); *see also Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525

(2007) (*citing* 20 U.S.C. §1415(f)(3)(E)(ii) as a standard the States must follow in conducting due process hearings). This statutory provision is substantially similar to the Sixth Circuit's determination that a procedural violation of the Act is only actionable if it results in substantive harm. *Knable*, 238 F.3d at 765-766 (finding that substantive harm occurs when the procedural violations "seriously infringe upon the parents' opportunity to participate in the IEP process" and that procedural violations depriving an eligible student of an IEP or result in the loss of educational opportunity are denials of a FAPE). Since Congress has expressly provided the Act's specialized adjudicators the standard to apply when confronting a party's procedural violations of the Act — one that replicates the very standard Petitioners question in their Petition —, there is no need for this Court to address the issue.

II. THE COURT SHOULD DEFER TO CONGRESS, THE UNITED STATES DEPARTMENT OF EDUCATION AND THE OHIO DEPARTMENT OF EDUCATION AND REFUSE TO DEFINE "EDUCATIONAL PLACEMENT".

Section 1415(j) of the IDEA in effect at the time Petitioners initiated the due process proceedings underlying this matter provides, in its entirety:

> Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current

> educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. §1415(j), Title 20, U.S. Code, Pub. L. 105-17, 111 Stat. 37, 93 (1997). The requirement that a child remain in his or her "then-current educational placement" upon the initiation of due process proceedings is commonly referred to as "stay put" and connotes "preservation of the status quo." *Thomas*, 918 F.2d at 625-626. The stay put provision is intended to "prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359, 373 (1985) (evaluating a former stay put provision found at 20 U.S.C. §1415(e)(3)).

Congress declined to define the phrase "educational placement" when it enacted each of the predecessors to today's IDEA. Further, Congress has refused to define the phrase even though it has revisited the Act sixteen times in the last twenty years and substantively revised Section 1415 in 2004. *See* Title 20, U.S. Code, Pub. L. 108-446, Sec 615(j), 118 Stat. 2647, 2725 (2004), amending 20 U.S.C. §1415(j). As a result, and as noted by the Tenth Appellate District, the courts are defining "educational placement" within the parameters of the factual circumstances presented to them. (Pet. App. at 15a (*citing AW, ex rel. Wilson, v. Fairfax County Sch. Bd.*, 372 F.3d 674, 679 (4th Cir. 2004) (*quoting Board of*

Educ. v. Illinois State Bd. of Educ., 103 F.3d 545, 548-549 (7th Cir. 1996)) and *Brimmer v. Traverse City Area Pub. Schs.*, 872 F. Supp. 447, 452 (D.C. Mich. 1994) (*citing DeLeon v. Susquehanna Comm. Sch. Dist.*, 747 F.2d 149, 153 (3rd Cir. 1984)))). Congress is presumed to be aware of the judicial interpretations accorded its statutes, but it has not acted despite the range of circumstances the courts have deemed educational placement. *See Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 782 n.15 (1985). The Court should not legislate for Congress by providing a definition that Congress, itself, has elected not to create. *See Honig v. Doe*, 484 U.S. 305, 325 (1988) ("[W]e are not at liberty to engraft onto the statute an exception Congress chose not to create.").

The United States Department of Education has likewise refused to provide a definition for "educational placement" despite its use of the phrase in its current regulations. *See, e.g.*, 34 C.F.R. §§300.116, 300.518 (formerly §300.514, Title 34, C.F.R., 64 Fed. Reg. 12406, 12452 (1999)). When promulgating its currently-effective regulations under the IDEA, the DOE received a comment that recommended "including in the regulations the Department's policy that a child's placement in an education program that is substantially and materially similar to the former placement is not a change in placement." 71 Fed. Reg. 46588 (2006). The DOE declined to include the recommendation, stating:

> . . . [I]t is the Department's longstanding position that maintaining a child's placement in an educational program that is substantially and materially similar to the former placement is not a change in

> placement. We do not believe further clarification is necessary in the regulations, however, as the distinction seems to be commonly accepted and understood.

71 Fed. Reg. at 46588-89 (2006). The commonly accepted and understood standard provides that a change in placement cannot exist without, "at a minimum, a fundamental change in, or elimination of[,] a basic element of the education program in order for the change to qualify as a change in educational placement." *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C. Cir. 1984); *accord Tennessee Dept. of Mental Health and Mental Retardation v. Paul B.*, 88 F.3d 1466, 1474 (6th Cir. 1996) *(citing Lunceford, supra); Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992) (*citing Lunceford, supra*).

Ohio's Department of Education has also seen no need to define "educational placement."[2] Rather, its administrative regulations effective when Petitioners initiated this litigation simply provided, "During the pendency of any impartial due process hearing or subsequent appeals, unless the parent and the school district agree otherwise, the child involved in the complaint must remain in his or her present educational placement." O.A.C. §3301-51-02(G)(6)(a), effective February 28, 1997. The phrase "educational placement" remains undefined in Ohio's current Administrative

2. Section 1415(a) of the Act requires the ODE to establish and maintain procedures to "ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education . . ." 20 U.S.C. §1415(a).

Code as well. Notably, Ohio's General Assembly has not defined the phrase either.

The Court should continue to defer to the actions, and inactions, of Congress, the DOE and ODE, and Ohio's legislature by declining to accept jurisdiction in this matter. *See Honig*, 484 U.S. at 325 n.8 (*citing INS v. Cardoza-Fonesca*, 480 U.S. 421, 448 (1987) and deferring "to the construction adopted by the agency charged with monitoring and enforcing the statute" absent a statutory definition or instructive legislative history concerning the meaning of "change in placement"); *Rowley*, 458 U.S. at 208 (*quoting San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) and cautioning that "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy'."). Upon this Court's denial of certiorari, the courts will continue to accord the phrase "then-current educational placement" its plain meaning under the specific facts presented them. *See Thomas*, 918 F.2d at 625; *see also Burlington*, 471 U.S. at 369 (relying on the "ordinary meaning" of the Act's language).

Ohio's Tenth Appellate District Court correctly determined that the April 10th addendum to Gregory Stancourt's IEP did not constitute a change in his educational placement. (Pet. App. at 21a) The thinning of reinforcers was clearly contemplated under the January 2002 IEP that Petitioners helped to develop and to which they consented. (Pet. App. at 20a) This pre-acknowledged thinning, coupled with the addendum's provision requiring reinstatement of the behavioral reinforcers in the event Gregory's mastery

of the targeted behaviors lapses, neither changes nor eliminates a basic element of his education program. *See Lunceford*, 745 F.2d at 1582. No change in placement occurred, and the April 10, 2002 addendum is properly part of the special education services the School District has provided Gregory during the pendency of these administrative proceedings.

Petitioners' stated concern that school districts will intentionally manipulate the placement of their choosing as a child's stay put is unwarranted. Had the thinning of reinforcers implemented through the April 10th addendum changed or eliminated Gregory's basic education program, the Tenth Appellate District would have deemed it a change in placement under its stated standard and, consequently, denied the addendum's implementation during these proceedings. Moreover, had Petitioners truly been concerned about the thinning of reinforcers on their son's behavior plan, they would have initiated the due process proceedings underlying this matter immediately rather than waiting three months. Regardless, it is evident that the courts are construing "educational placement" in a manner that realizes the intent of the IDEA and ensures the provision of special education and related services to disabled children under the Act.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Respondents, therefore, respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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